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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-173

DANIEL STEVENS,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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OPINIONS BELOW

The opinion of the Supreme Court of Missouri affirming the conviction and sentence of petitioner is reported as *State* v. *Stevens*, 467 S.W.2d 10 (Mo. 1971). The order of the Supreme Court of Missouri denying petitioner's motion for rehearing or transfer to the court en banc is reported, without memorandum, along with the above opinion.

JURISDICTION

Respondent hereby accepts petitioner's jurisdictional statement.

QUESTIONS PRESENTED

1. Whether, under the Sixth Amendment of the Constitution of the United States, the withdrawal and analysis of a blood sample is a critical stage of a criminal proceeding, therefore requiring the presence and representation by counsel at the time such blood is withdrawn.

2. Whether, the procedure of informing petitioner of his Miranda rights, affirmatively determining that petitioner has understood the explanation of those rights, and observing that petitioner wanted to answer questions without the presence of counsel is sufficient to show a waiver of petitioner's right to counsel and his right to remain silent.

STATEMENT

On July 31, 1969, an indictment was filed in the Circuit Court of St. Louis County, Missouri charging petitioner with first degree murder in connection with the death of Mrs. Elizabeth Abbott. Thereafter, on August 8, 1969, petitioner was arraigned and entered a plea of not guilty. From October 27, 1969 thru November 6, 1969, a trial was held in Division No. 4 of the Circuit Court of St. Louis County, Missouri, the Honorable Herbert Lasky, Judge, presiding. The trial court instructed the jury on murder in the first degree and in the second degree. The jury returned a verdict of guilty of murder in the second degree and entered a finding that it was unable to assess punishment. On December 17, 1969, the trial court pronounced judgment and sentenced petitioner to a term of life imprisonment. From that judgment and sentence, petitioner

appealed to the Supreme Court of Missouri. In April 1971, the Supreme Court of Missouri affirmed the judgment and sentence of the trial court and thereafter, on May 10, 1971, denied petitioner's motion for rehearing or transfer to court en banc. *State* v. *Stevens*, 467 S.W.2d 10 (Mo. 1971). The salient facts underlying petitioner's conviction are stated as follows:

On November 25, 1968 at approximately 1:30 p.m., Gary Kehoe, nephew of the deceased, found the body of Elizabeth Abbott at her residence at 233 Dennison, Ballwin, Missouri. Mrs. Abbott had been repeatedly beaten over the head with a six pound barbell and had died sometime after ten o'clock and before noon on that day.

In response to Kehoe's call, members of the St. Louis County and Ballwin Police Department came to the scene of the crime. The barbell was found lying next to the body of the deceased. An investigation revealed the presence of a fabric mark or glove mark impressions on the barbell, but no fingerprints were found.

Petitioner, who was 14 years old on November 25, 1968, was a next door neighbor of the deceased. On the day of the crime, petitioner had stayed home from school to care for his younger brother. Richard Abbott, son of the deceased, had a brief conversation with petitioner in the deceased's house at approximately 8:00 a.m. on November 25, 1968.

On November 26, 1968, Officer Gockel and Chief Loehr of the Ballwin Police Department found a yellow shirt and a pair of gloves in a multiflora rose bush near the petitioner's residence. A chemical analysis of the stains found on the yellow shirt and right hand glove showed the presence of human blood Type O. The deceased's blood was Type O, positive, the petitioner's Type A, positive. Hairs found on the yellow shirt, the right hand glove, in

the hallway of the deceased's house, and from the deceased's hair roller were analyzed in a nuclear activation analysis experiment and all were found to be from the same person, i.e. the deceased. Petitioner admitted that he had had a similar shirt and pair of gloves, but claimed that he had thrown the yellow shirt away on the morning of the murder and that he had lost the gloves several days before. A blue shirt found in petitioner's bedroom proved to be identical in several respects to the yellow shirt—both were short sleeved, the same size, and the same brand name.

On November 26, 1968, at approximately 2:00 p.m. Officers Zimmerly and Binggeli talked with petitioner in the principal's office at Crestview High School. Officer Binggeli noticed a spot on the insole of petitioner's right shoe and took a scraping of the spot. At that time Officer Binggeli also scraped some material from beneath petitioner's fingernails. The chemical analysis of the shoe scraping showed the presence of human blood, but the blood could not be typed due to the insufficiency of the sample. A chemical analysis of the fingernail scrapings showed the presence of blood, but it could not be determined whether the blood was human blood due to the insufficiency of the sample.

At approximately 5:00 p.m., November 26, 1968, Officer Gockel and Chief Loehr of the Ballwin Police Department went to Crestview High School and placed petitioner under arrest. The officers immediately delivered petitioner to the St. Louis County Juvenile Detention Center. Thereafter, petitioner was remanded to the adult court for trial.

In March 1969, petitioner admitted to Ralph Turnbough and Thomas Mound, fellow detainees with petitioner in the St. Louis County Juvenile Detention Center, that he had beat the deceased in the head with a barbell.

ARGUMENT

I.

The withdrawal and analysis of a blood sample is not a critical stage of the criminal proceedings at which representation by counsel is required, and therefore the extraction of blood from petitioner was not a denial of his rights under the Sixth Amendment to the Constitution of the United States.

Petitioner's first contention asserts that the extraction of a sample of petitioner's blood for group and type analyzation was violative of his rights under the Sixth Amendment of the Constitution of the United States. Respondent believes this contention to be completely unsupported by the case law of this court which interprets and applies the Sixth Amendment.

Before trial petitioner was taken from the Juvenile Detention Center to St. Louis County Hospital where, at the request of the Police, a blood sample was withdrawn and chemically analyzed for blood group and type. Petitioner's retained counsel was not notified and was not present when the blood sample was extracted and analyzed.

At trial Dr. Varkey Phillip, a physician attached to St. Louis County Hospital, testified that he withdrew the blood sample from petitioner. The doctor, however, did not personally analyze the sample but forwarded it along with a requisition form for blood grouping analysis to the hospital's laboratory. The results of the analysis (blood type A positive) were recorded on the requisition form which was introduced into evidence as State's Exhibit No. 58.

Petitioner maintains that he was denied the right to the assistance of counsel in that his retained counsel was not notified and was not present when the blood sample was voluntarily given by petitioner. The United States Supreme Court has held that the presence of counsel is required at each critical stage of the criminal proceedings against an accused. *Powell* v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); *Hamilton* v. *Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); *White* v. *Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); *Miranda* v. *Arizona*, 382 U.S. 925, 86 S.Ct. 320, 15 L.Ed.2d 338 (1965); *United States* v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). This court has defined a critical stage as one where the defendant's rights may be prejudiced and the presence of counsel may help avoid that prejudice, or when the presence of counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right to meaningfully cross-examine the witnesses against him and to have the effective assistance at the trial itself. *United States* v. *Wade*, 388 U.S. at 227. It is respondent's contention that a blood sample analysis involves neither of these considerations and is therefore not a critical stage requiring the presence of counsel. *Schmerber* v. *California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *United States* v. *Wade*, *supra*.

In *Schmerber* v. *California*, *supra*, a blood sample was withdrawn from the defendant for alcoholic analysis despite his refusal, based upon the advice of counsel, to consent to the test. The defendant alleged that the withdrawal of the blood sample and the admission of the analysis in evidence against him at trial violated the privilege against self-incrimination and the right to the assistance of counsel.

Drawing upon the well established principle that the privilege against self-incrimination is a bar against compelling testimony or communications, but not a bar against compulsion which makes the accused the source of real physical evidence, this court found that the blood sample was real or physical evidence and that compelling the defendant to submit to the blood analysis test did not violate his privilege against self-incrimination. As the defendant had no right to protect, the court held that he was not denied the right to the assistance of counsel:

> "Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. . . . No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. . . ." *Schmerber* v. *California*, 384 U.S. at 765.

Thereafter, in *United States* v. *Wade*, 388 U.S. at 227-228, this court stated:

> "We think there are differences which preclude such stages [systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like] being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary processes of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate from his right to a fair trial."

Respondent believes that the above language from *United States* v. *Wade* is significant and controlling in the case at bar. This language stands for the proposition that the extraction and analysis of a blood sample is not a critical stage requiring the presence of counsel since a defendant's rights are not prejudiced by appearing at such stage without the assistance of counsel. A defendant's participation at such a stage is in fact irrelevant, except as a donor, because the results of the test depend upon the chemical analysis alone.

While *Schmerber* v. *California, supra,* concerned the extraction of a blood sample for alcoholic analysis, the blood sample was extracted in this case for group and type analysis. The difference in the reasons for the extraction of a blood sample, however, is irrelevant because the blood sample itself is real or physical evidence no matter what the purposes of analysis may be. *Wilson* v. *State,* 225 So.2d 321 (Fla. 1969); *Brent* v. *White,* 398 F.2d 503 (5th Cir. 1968), Cert. Den. 393 U.S. 1123, 89 S.Ct. 998, 22 L.Ed.2d 130 (1969); *Commonwealth* v. *Gordon,* 246 A.2d 325 (Pa. 1968), Cert. Den. 394 U.S. 937, 89 S.Ct. 1215, 22 L.Ed.2d 469 (1969); *State* v. *Cary,* 230 A.2d 384 (N.J. 1967); *Davis* v. *State,* 57 A.2d 289 (Md. 1948).

Petitioner has relied on *Graves* v. *Beto,* 424 F.2d 524 (5th Cir. 1970), in claiming that "a search of the body by means of extracting blood for the purposes of typing have been held to come within the safeguards of the Fourth Amendment". (Petition page 8). Respondent believes that petitioner's reliance upon the Fourth Amendment as a basis for writ of certiorari is ill founded. It should be noted that the issue of an illegal search i.e., that a search warrant should have been obtained prior to the extraction, was never argued in the trial court nor in petitioner's appeal to the Supreme Court of Missouri. Respondent believes that a proper predicate for the issue of an illegal

search has not been laid and that the trial court and the Missouri Supreme Court were never given an opportunity to rule on this contention. Thus, respondent believes that the petitioner has failed to comply with Rule 19.1(a), Revised Rules of the Supreme Court of United States. Respondent also believes that the blood sample given by petitioner was freely and voluntarily given and that the record supports this assertion (Page A-33, Petition).

Respondent fails to see what rights could have been protected if petitioner's counsel had been notified and advised that petitioner was going to be asked for a sample of his blood. Certainly, the petitioner did not acquire any greater rights than did the defendant in *Schmerber* v. *California, supra,* simply because his retained counsel did not know that the blood sample was to be withdrawn. The facts remain that petitioner's rights were not prejudiced by submitting to the test in the absence of counsel and, thus, there is no issue as to the ability of counsel to help avoid any prejudice to the petitioner's rights or to meaningfully assist petitioner at trial.

Petitioner's reliance upon *Massiah* v. *United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), is unjustified. In that case, the defendant, after being indicted with other persons for violating federal narcotics laws, retained an attorney, pled not guilty, and was released on bail. While free on bail, the defendant had a conversation in the absence of his retained counsel with one of his co-defendants, unaware that the co-defendant had turned informer and that the meeting was prearranged by federal agents who, while out of sight, overheard defendant making incriminating statements. In reversing defendant's conviction, this court characterized the prearranged meeting as deliberate but surreptitious interrogation and noted that such an interrogation was as critical a stage as an interro-

gation conducted in the jail house. The conclusion that *Massiah* was denied the right to the assistance of counsel rested upon the court's conclusion that:

> "Anything less . . . might deny a defendant effective representation by counsel at the only stage where legal aid and advice would help him." *Massiah* v. *United States*, 377 U.S. at 204.

The distinction between *Massiah* v. *United States*, and *Schmerber* v. *California* is readily apparent. The incriminating evidence deliberately elicited in *Massiah* was clearly testimonial, and counsel could have helped to safeguard the defendant's privilege against self-incrimination from being jeopardized during the interrogation. On the other hand, the evidence obtained from petitioner (and from the defendant in Schmerber) was non-testimonial, and thus, there is no issue as to the ability of counsel to help avoid any prejudice to the petitioner's rights. The difference between the holdings in *Schmerber* and *Massiah* simply highlights the difference between the nature of an interrogation and a blood analysis test, indicating why the former is a critical stage requiring the presence of counsel and the latter is not a critical stage. In an interrogation, whether custodial or surreptitious, incriminating evidence is obtained directly by the defendant's responses and reactions to the conduct of the police, while in a blood analysis test, incriminating evidence is obtained through chemical analysis, the conduct of the police and the participation of the defendant, except as donor, being irrelevant.

Petitioner also claims that, "With the due notice, petitioner's counsel might well have hired his own experts to perform the same examinations and tests as those performed by the prosecuting authorities." (Petition page 9). Respondent considers this argument to be frivolous. First, counsel could have deposed the doctor who withdrew pe-

titioner's blood sample and the medical technician who analyzed the sample as their names and addresses were indorsed on the indictment. *State* v. *Aubuchon,* 381 S.W.2d 807 (1964); Missouri Supreme Court Rule 25.10, V.A.M.R. Counsel also could have made a motion to produce under Supreme Court Rule 25.19, V.A.M.R. Also, as suggested in *United States* v. *Wade,* 388 U.S. at 227, counsel could have had a separate analysis made for his own use, to use as a comparison to check the accuracy of the State's blood sample analysis. Counsel also had the opportunity to check the accuracy of the State's blood sample analysis by cross-examining the State's expert at trial on the basis of readily available scientific information. There is no issue as to the State's suppression of evidence favorable to the petitioner. The important point is not that counsel for petitioner could have discovered the results of the blood analysis test and checked it for accuracy, but that the lower courts should not be judged guilty of an error where counsel failed to take readily available steps to discover the information so desired.

It is thus respondent's position that petitioner was clearly not denied his right to have the assistance of counsel in compliance with the Sixth Amendment to the Constitution of the United States. It is also clear that the issue of petitioner's denial of his Fourth Amendment right to be secure from an unreasonable search is not a proper issue upon which to base a petition for writ of certiorari to this court. Appellant has never raised the issue of an illegal search in any state proceeding and as such, has not met the requirements of Rule 19.1 (a), Revised Rules of the Supreme Court of the United States.

II.

Testimony by a police officer of statements made by petitioner during custodial interrogation was properly admitted as evidence.

As a second basis for arguing that a writ of certiorari should issue, petitioner contends that testimony of statements made by petitioner during a custodial interrogation was introduced without any showing that petitioner or his parents made a knowing and intelligent waiver of petitioner's right to remain silent, and petitioner's right to counsel during interrogation. Respondent believes that during the progress of the case through the courts of Missouri the question of a waiver of petitioner's right to counsel has been confused with the question of petitioner's waiver of his right to remain silent. The record of the trial shows that petitioner's attorney requested an interlocutory hearing on the question of the admissibility of statements taken from the petitioner when it became apparent that testimony of those statements was about to be offered (Tr. 236). At the trial, however, petitioner's attorney argued that evidence admitted during this interlocutory hearing showed no waiver by petitioner of his right to remain silent (Tr. 247-249). Likewise in his motion for new trial petitioner did not specify as error the introduction of petitioner's statements without showing a waiver by petitioner of his right to counsel at the time the statement was taken. Instead, petitioner's motion for new trial alleged that petitioner was not apprised of his basic constitutional rights, guarantees, and privileges prior to the interrogation, and that for several reasons petitioner could not be held to have validly waived these rights, guarantees and privileges (Tr. 1197-1198). On appeal, however, petitioner's contention shifted from an allegation of no waiver of petitioner's right to remain silent to an allegation that no waiver had been

shown of petitioner's right to counsel, during the interrogation (Appellant's Brief to the Supreme Court of Missouri pages 26-29). The Missouri Supreme Court recognized this shift in its opinion and determined that the question of whether petitioner waived his right to the presence of counsel during interrogation was being raised for the first time on appeal (467 S.W.2d 18-19). In his petition to the Supreme Court of the United States seeking a writ of certiorari, petitioner is raising both issues. Petitioner contends that his rights under the Miranda decision were violated because his past statements were introduced without a showing that he had waived his right to remain silent and without a showing that he had waived his right to the presence of counsel during the interrogation.

While petitioner asserts that the record must show that there was no waiver by petitioner of these two rights, respondent believes there was a volume of evidence which would indicate that the trial court properly admitted the statements to evidence and that the Supreme Court of Missouri was correct in affirming that decision. There was evidence that petitioner was advised of his "Miranda rights" upon arrest and that petitioner stated that he fully understood those rights (Tr. 231-233); that an officer further admonished petitioner not to make any statements to the police (Tr. 233); that after petitioner arrived at the Juvenile Detention Center he was again informed of his "Miranda rights" before the beginning of the interrogation and that petitioner stated that he understood those rights (Tr. 239-240); that before the interrogation commenced the interrogating officer informed the petitioner that he wanted to ask him questions concerning the death of Mrs. Abbott and that he then conducted a brief investigation of petitioner's educational background in order to determine his capacity to understand (Tr. 239-241); that petitioner stated that he wanted to answer the interrogat-

ing officer's questions (Tr. 242, 245); that petitioner's parents were present during the questioning and that petitioner's father urged or advised petitioner to tell the police his story (Tr. 254). In addition there was no evidence that the statements were procured by coercion or threats, either physical or mental, or by promises of leniency or reward. Upon this evidence the trial court found that petitioner's statements were voluntarily made and petitioner's motion to suppress was denied (Tr. 266-267).

On appeal the Supreme Court of Missouri affirmed petitioner's conviction and found against petitioner on his argument that there was no showing that petitioner had waived his right to counsel during interrogation. The court stated that first of all, the statements when offered in evidence at trial were not objected to for this reason, and that the trial court could not be held to have committed error in failing to refuse testimony for a reason not presented to it. The court stated that this is a procedural rule which prevents an accused from trapping the trial court by presenting to it an unmeritorious reason in support of an objection and then presenting an entirely different reason to the appellate court (467 S.W.2d 18). Respondent believes, therefore, that the Supreme Court of Missouri decided this issue against petitioner on an independent and adequate state ground, and that therefore the federal question is not determinative and the judgment should not be reviewed by this court. Respondent further contends that this procedural rule serves a legitimate state interest which a state may enforce through its rule of evidence. *Henry* v. *Mississippi*, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

The Supreme Court of Missouri decided against petitioner on the issue of whether petitioner's right to pres-

ence of counsel was waived for another reason also. In its opinion the court states:

> "Our second reason is that the evidence at the interlocutory hearing clearly shows that appellant was offered counsel but intelligently and understandingly rejected the offer, and that a 'silent record' is not relied on as a basis of presuming waiver of counsel at the interrogation. . . ." (467 S.W.2d 18).

Therefore, the Missouri Supreme Court found that this offer and rejection was a waiver. It then concluded that the evidence supported the trial court's conclusion that petitioner had waived his right to the presence of counsel during the interrogation. *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *Keegan* v. *United States*, 385 F.2d 206 (9th Cir. 1967), Cert. Den., 391 U.S. 967, 88 S.Ct. 2038, 20 L.Ed.2d 880 (1968); *Bond* v. *United States*, 397 F.2d 162 (10th Cir. 1968); *United States* v. *Montos*, 421 F.2d 215 (5th Cir. 1970), Cert. Den., 90 S.Ct. 1262 (1970).

Petitioner also argues that testimony of his prior statements were made without a showing that he knowingly and intelligently waived his right to remain silent. This issue, however, unlike the issue of waiver of petitioner's right to counsel, was not as such presented to the Supreme Court of Missouri on appeal. Respondent believes, therefore, that under Rule 19.1 (a) of the Revised Rules of the Supreme Court of the United States petitioner is not entitled to a writ of certiorari because he is seeking a writ on an issue which was not presented to the state court on appeal.

The evidence on the issue of the waiver of petitioner's right to counsel during interrogation is equally applicable

to the issue of the waiver of petitioner's right to remain silent. While this issue was not properly raised on appeal before the Supreme Court of Missouri, the trial court did find this issue against the petitioner at the close of the interlocutory hearing (Tr. 266-267). Respondent believes that the evidence shows that petitioner was twice advised that he had the right to remain silent, that there was an objective determination that he understood the explanation of that right, and that thereafter petitioner affirmatively stated that he wanted to answer the police officer's questions. This affirmative statement was in essence a waiver by petitioner of his right to remain silent. In addition the mere fact that after being informed of his right to remain silent petitioner knowingly and intelligently continued to actively participate in the interview is also an implicit waiver of petitioner's right to remain silent. *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Therefore, respondent believes that the resolution of this question, though it was determined at the trial court level, is in accordance with the applicable decisions of the Supreme Court of the United States on this issue, and that therefore, even if this issue is considered on its merits, a writ of certiorari should not be granted.

CONCLUSION

For the foregoing reasons respondent believes that the decision by the Supreme Court of Missouri on the issues raised by petitioner in his petition for writ of certiorari are in accordance with the applicable decisions of the Supreme Court of the United States. Therefore, respondent re-

spectfully requests that this petition for writ of certiorari to the Supreme Court of the State of Missouri be denied.

Respectfully submitted,

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